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No. 94-1268

In the

Supreme Court of the United States

October Term, 1994

Joint School District No. 241, et al,

Petitioners,

v.

Phyllis Wright Harris, on her own behalf and on behalf of her three children, Beverly Harris Butler, formerly Beverly Harris, Samuel Harris,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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INTEREST OF THE *AMICUS*

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations,

the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands, Guam and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

REASON FOR GRANTING THE WRIT

The public schools are currently the site of religious warfare between advocates of prayer at graduation and other school events (who interpret this Court's decision in *Lee v. Weisman*, 112 S.Ct. 2649 (1992), narrowly to preclude only clergy-led prayer at graduation ceremonies) and those who interpret *Lee* broadly to preclude any direct involvement by school officials in prayer at any school event. This is not just a routine legal dispute. Both sides are using the public schools and public school children as tools to argue their respective sides of this issue.

School boards are caught in the middle and do not know which way to turn: Should they take the more conservative path and treat *Lee v. Weisman* as precedent in guiding their decisions -- thus risking the wrath of constituents who cite *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2950 (1993), in support for their "right" to pray at graduation? Or do they follow the advice of lawyers for religious interests who argue that *Lee* has limited value as precedent, applying only to the facts in that case -- thus risking a lawsuit by parents of objectors to the prayers or by the American Civil Liberties Union (ACLU)? (The ACLU has threatened to file suit to protect the interests of those who do not support involvement of the schools in prayer at school events.) Only this Court can solve this dilemma; and NSBA urges the Court to do so, thus protecting the schools from the onslaught

of litigation and public dissension on this very emotional issue that has intensified and turned into a raging controversy since this Court denied *certiorari* in *Jones*.

ARGUMENT

Introduction

Although NSBA supports the petition in this case, it does not necessarily support the Petitioners and will not take a position in the event this Court grants the petition for *certiorari*, because its membership is split on the policy question related to student-led prayer. NSBA takes this unusual action because it believes that this issue cries out for a resolution. Each side, of course, purports to speak with authority as to the state of the law, thus adding more confusion than clarity to the debate. Those that support the school district's position to allow student-led prayer characterize their opponents as "anti-Christian," while those who contend that student-led prayer is

unconstitutional maintain that their opponents are knowingly violating the law of the land.

I. The court of appeals decision directly conflicts with the widely publicized Fifth Circuit decision in *Jones v. Clear Creek*, thus creating great confusion for those attempting to comply with *Lee*.

In *Jones v. Clear Creek*, the Fifth Circuit decision implied that *Lee v. Weisman* was wrongly decided and upheld the type of student-led prayer found unconstitutional by the Ninth Circuit's decision here. The conflict in the circuits created by the Ninth Circuit decision together with the intemperance of the Fifth Circuit's decision in *Jones* and the publicity engendered by advocacy groups have made judicious policymaking difficult, if not impossible. Even where school boards disagree as a matter of policy with particular court decisions, they still want to obey the law and therefore seek legal advice. After this Court's decision in *Lee*, many school lawyers across the country in addressing the variety of

factual questions that remained undecided took a conservative approach and advised their clients that direct school involvement in prayer at school activities would raise serious questions. In many communities, this cautious interpretation is being overwhelmed by conflicting legal advice that school boards are receiving from interest groups who elevate the importance of the *Jones* decision, inaccurately characterizing this Court's denial of *certiorari* as a decision on the merits.

II. The national publicity and community pressures ensuing from the decision in *Jones v. Clear Creek* and the conflict in the circuits generated by the decision below have created a divisive national controversy detrimental to the operation of public schools across the country.

The conflicting pressure imposed by organizations representing religious interests and those representing interests devoted to the "separation of Church and State" have turned public schools into battlefields.

One national Christian legal organization, the American Center for Law and Justice (ACLJ), has dispatched an army of "SWAT teams" to "battl[e] it out in the nation's school districts . . . in a nationwide campaign to educate students about their constitutional right to pray and speak out about God at graduation ceremonies . . ." ACLJ News Release, 4/5/93. The mission of this well-funded organization is to fight for prayer in the schools. Since this Court's decision in *Lee*, the American Center for Law and Justice has inundated every public school superintendent in the country with numerous bulletins containing the Center's legal analysis of *Lee*, *Jones*, the decision below and other school prayer issues.

An August 21, 1992 bulletin supported a "See You at the [flag]Pole" event for students to "offer prayers for their school, teachers, administrators and the nation." This letter described *Lee* as answering "only one question:

Can school officials invite a member of the clergy to offer a prayer at a school sponsored event?" A November 20, 1992 bulletin began with the proposition that "voluntary student-led prayer is constitutionally protected on public school campuses." It advocated student-led prayer at graduations and other school events. Another ACLJ bulletin sent to all public school districts in November of 1992 promoted the organization's views on Christmas observances. A bulletin dated "school year 1992-1993" included an analysis of both *Lee* and *Jones v. Clear Creek* and concluded that "students have the right to include an invocation and benediction in their graduation exercises."

The ACLJ also wages its religious crusade on other legal fronts. By its own account, the ACLJ is currently involved in disputes relating to student-led prayer in more than 130 school districts in some 25 states. ACLJ News Release, April 5, 1993. News reports

from across the country lend credence to this statement. *See, e.g.*, "Robertson Trying Again to Put Prayer in Schools," New York Times, 4/16/93; "School District Votes to Keep Prayer in Schools," Hilbert, Wisconsin Associated Press, 1/20/93; "Students Considering Taking Prayer into Their Own Hands," Clearfield, Utah, Associated Press, 2/23/93; "Board Opts for Students, not Clergy, to Lead Prayer at School Event," Dickinson, Texas, Associated Press, 2/23/93; "Attorney Says Moment of Silence May Replace Graduation Prayer," Sheboygan, Wisconsin, Associated Press, 4/14/93; "Students Can Decide Graduation Prayer Issue, Board Says," Goshen, Indiana, Associated Press 4/13/93; "Graduation Prayer Advocates Launch Self-Styled 'SWAT Teams'," Education Daily, 4/6/93; "Attorney General [of Michigan] Disputes 'Loopholes' in Ban on School Prayer: A law center founded by TV evangelist Pat Robertson claims that school districts can get around the Supreme Court

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School districts have also received communications from religious groups opposing formalized student-led prayer. Over 500 religious leaders, representing over 500 churches and synagogues of various faiths in 44 states, signed an "open letter" to school board presidents and superintendents of schools, in response to statements by community officials urging that "prayer be returned to the public school systems of this nation," and to the "legal SWAT teams" advocating "so-called student-led, organized

prayer at public school graduations." The letter stated:

> As we approach public school graduations this year, we urge all people of faith to declare a permanent cease fire on this issue, and work to promote the true cause of religious liberty, including the separation of church and state. It is critical to our society and to the fundamental well-being and liberty of our children that these precepts of religious freedom be preserved, and that you, as educators, respect those principles. All of us must make every effort to prevent our public schools from becoming a battleground over religion and to promote true religious liberty.

"An Open Letter to School Board Presidents and School Superintendents on Freedom of Religion and Prayer in Public Schools," April, 1994.

In a number of states, school districts have received letters from both sides of the controversy. In Virginia, for example, both the American Civil Liberties Union (ACLU) and the ACLJ sent letters to school districts interpreting the *Jones* decision. "Virginia Schools Struggle with Supreme Court Ruling on

Prayer," Richmond, Virginia, Associated Press 4/19/93. The ACLU sent out a bulletin challenging ACLJ's interpretation to school districts in a number of other states. A spokesman for ACLU said recently that any school district relying on the advice of the American Center for Law and Justice "will get its pants sued," "Can Religion, Graduation Mix?," UPI, 4/5/93.

A similar issue to the one presented here is also causing a great deal of dissension in the schools: prayer at school athletic events. Both the ACLJ and the ACLU have taken positions on this issue paralleling their views on student-led prayer at graduation. ACLJ again interprets *Lee* as not reaching anything beyond clerical prayers at graduation, and ACLU interprets the case to preclude "school sponsored" prayers at any school event.

Meanwhile political activity is running rampant on this issue as well. "Attorney

General [of South Carolina] says Prayer at Athletic Events Legal," Rock Hill, S.C., Associated Press, 1/5/93; "ACLU Says Medlock Wrong with School Prayer Opinion," Columbia, S.C., Associated Press, 1/6/93; "House [in Oklahoma] Passes Bill for Policy on Prayer at School Athletic Events," Oklahoma City, OK, Associated Press, 3/13/93.

The national debate and legal machinations of interest groups have elevated the issue in this case to one of national importance. Public schools are accustomed to controversy, and the public often expects them to be the progenitors of solutions to some of society's most difficult and contentious social issues, *e.g.*, desegregation, AIDS, crime, drugs, and even asbestos. Perhaps the most wrenching issue of all, in any civilization, is the harmonious existence of many religions and the relationship of the state to them all. The schools need this Court's guidance to resolve the issue.

Conclusion

Amicus urges this Court to grant the petition for *certiorari* and to settle the intense controversy as to the permissible scope of official school district involvement in prayer at school functions.

Respectfully submitted,

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